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NO. 71-978

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1971

LINDA GOMEZ, ET AL.,

Petitioners

v.

FRANCISCO G. PEREZ,

Respondent

On Application for Writ of Certiorari to the United States Supreme Court from the Supreme Court of Texas

MEMORANDUM FOR THE STATE OF TEXAS AS AMICUS CURIAE

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NO. 71-575

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1971

LINDA GOMEZ, ET AL.,

Petitioners

v.

FRANCISCO O. PEREZ,

Respondent

On Application for Writ of Certiorari to the United States Supreme Court from the Supreme Court of Texas

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MEMORANDUM FOR THE STATE OF TEXAS AS AMICUS CURIAE

This memorandum is submitted pursuant to the Court's invitation of March 13, 1972.

The Petitioners are a mother and her illegimate child who sought to have the natural father declared as the father of the illegitimate child by the 150th Judicial District Court of Bexar County, Texas, in addition to making an award for child support payments. The trial court found the Respondent, the alleged natural father, was in fact the father of the Petitioner child but that such child was born out of wedlock. Based upon these findings, the trial court denied the request for child support payments on the grounds that in Texas there exists no civil liability on the part of a father to support an illegitimate child.

In the case of *L. G., et al. v. F. O. P.*, 466 S.W.2d 41 (Tex. Civ. App. 1971, writ ref., n.r.e.), the Court of Civil Appeals affirmed the decision of the trial court. The Supreme Court of Texas subsequently refused to grant an application for writ of error with the notation that there was no reversible error. The Petitioners have now appealed to this Court and seek the granting of their writ of certiorari.

While not wishing to debate the sociological and economic arguments advanced by Petitioners to justify requiring the natural father of an illegitimate child to assume the burden of support of such child, amicus curiae is of the opinion that in this case such a decision is one which must be determined in legislative halls rather than by judicial fiat. Consequently, the decision rendered by the court below should be either affirmed or certiorari denied. Such a decision would neither offend nor conflict with this Court's previous decisions in *Levy v. Louisiana,* 391 U.S. 68, 88 S.Ct. 1509, 20 L.Ed 2d 436 (1968); *Glona v. American Guaranty and Liability Ins. Co.,* 391 U.S. 73, 88 S.Ct. 1515, 20 L.Ed.2d 441 (1968); *Labine v. Vincent,* 401 U.S. 532 (1971); or *Weber v. Aetna Casualty & Surety Co.,* 40 L.W. 4460 (April 24, 1972).

In Texas, the natural father of an illegitimate child is under neither a common law nor statutory duty to support his illegitimate children. *Home of the Holy Infancy v. Kaska,* 397 S.W.2d 208 (Tex. 1966); *Lane v. Phillips,* 69 Tex. 240 (Tex. 1887); *Beaver v. State,* 96 Tex. Crim. 179, 256 S.W. 929 (1923). Whether this long recognized principle in the jurisprudence of the State of Texas is to join the rapidly swelling ranks of those statutes and legal decisions of Texas and other states invalidated by the ever growing and proliferating demands of the Equal Protection Clause of the

Fourteenth Amendment to the Constitution of the United States, necessitates an examination of those cases in this area commencing with *Levy*.

Levy was an action on behalf of minor illegitimate children for the wrongful death of their mother. The children had sued to recover under a Louisiana statute, and the Louisiana courts had held that "child" in the wrongful death statute meant "legitimate child". The appeal to the United States Supreme Court was based upon the contention that such a result constituted a violation of the Due Process and Equal Protection Clauses of the Fourteenth Amendment to the Constitution of the United States. *Glona* was a companion case involving the same facts with the exception that it was an action to recover by the mother for the wrongful death of an illegitimate child. Footnotes in the case of *Levy v. Louisiana* reveal that under Louisiana law both parents are under a duty to support their illegitimate children.

The court in *Levy v. Louisiana* stated that:

> "The rights asserted here involve the intimate, familial relationship between a child and his own mother. When the child's claim of damage for loss of his mother is an issue, why, in the terms of 'equal protection', should the tort feasors go free merely because a child is illegitimate? . . .
>
> ". . .
>
> "We conclude that it is invidious to discriminate against them when no action, conduct, or demeanor of theirs is possibly relevant to the harm that was done the mother."

In *Glona* this Court applied the same reasoning as in *Levy*, but of interest is this Court's statement, or possible warning, in its opinion that:

"Opening the courts to suits of this kind may conceivably be a temptation to some to assert motherhood fraudulently. That problem, however, concerns burden of proof. *Where the claimant is plainly the mother,* the state denies equal protection of the laws to withhold relief merely because the child, wrongfully killed, was born to her out of wedlock." (Emphasis added.)

The foregoing statement is significant in the present case because Petitioner would have this Court venture into that new area where parenthood is not so readily proved or disproved.

Whether the decision in *Levy* and *Glona* would be extended beyond the relationship between the mother and the illegitimate child so as to include relationships involving the father was most interestingly commented upon by the court in the case of *Jerry Vogel Music Co. v. Edward B. Marks Music Corp.,* 425 F.2d 834 (2nd Cir. 1969), where in the opinion it was held that:

"Plaintiff pretermits what an enthusiast over *Levy* characterizes as 'the interesting question... whether it will be extended to the father-child relationship,' with what is considered the pleasant result of invalidating 'hundreds of state statutes and several federal laws' [footnote — Krause, Legitimate and Illegitimate Offspring of Levy v. Louisiana—First Decisions on Equal Protection and Paternity, 36 U. Chic. L. Rev. 338, 339 (1969)]—not to speak of the common law rule in force when the Fourteenth Amendment was adopted. The highest courts of Ohio and Missouri have reached differing results concerning the illegitimate child's right to paternal support, Boston v. Sears, 15 Ohio St. 2d 166, 239 N.E.2d 62 (1968); R—— v. R——, 431 S.W.2d 152 (Mo. 1968); cf. Munn v. Munn, 450 P.2d 68 (Colo. 1969). In Schmoll v. Creecy, 54 N.J. 194, 254 A.2d 525 (1969), the Supreme Court of New Jersey refused, in the light of Levy to follow a direction in

the state's wrongful death statute keying recovery to those entitled to take by intestacy when that course would have ruled out illegitimate children of a father. The effect of *Levy* and *Glona* in cases of actual intestacy of the father, which *De Sylva* held to be the closest parallel to the forced succession of the Copyright Act., seems not yet to have been directly decided by the highest court of any state. But see In re Estate of Jensen, 162 N.W.2d 861, 877-879 (N.J. 1968); Succession of Bush, 222 So.2d 642 (La. Ct. App. 1969); Strahan v. Strahan, 304 F.Supp. 40 (W.D. La. Sept. 22, 1969).

"We find it unnecessary to attempt to forecast whether the Supreme Court will differentiate between the situations of the father and of the mother [footnote—We do suggest, however, that the differences in the problem of proof are not to be minimized. As any lawyer with experience in defending against claims of relationship advanced long after the critical date would vividly realize, it is altogether too simplistic to say 'Recovery should be denied in the absence of proof, but granted in the presence of proof.' See Krause, supra, 36, U. Chic. L. Rev. at 344]."

Before discussiong *Labine* and *Weber,* it would seem that this Court has already indicated its reluctance to extend the decision in *Levy* and *Glona* beyond the facts presented in such cases. *Levy* and *Glona* were decided on May 20, 1968, and less than a month later, on June 17, 1968, this Court rendered its decision in the case of *King v. Smith*, 392 U.S. 309 (1968). This case dealt with whether the "substitute father rule" of the State of Alabama, in connection with its operation of the AFDC Program (Aid to Families With Dependent Children) was in conflict with the provisions of the Social Security Act and the Constitution of the United States. The court in its decision based its decision upon the Social Security Act rather than constitutional

grounds in deciding that the Alabama rule was invalid. However, it is interesting to note in the concurring opinion in *King* an attempt was made to base the decision upon the reasoning of the court in *Levy,* but apparently the majority of the court did not desire to so extend the doctrine of *Levy.* This becomes even more important when one considers and studies the facts actually before the court in *King.* In Alabama, only legitimate children are entitled to support from their parents. If the doctrine of *Levy* was intended by this Court to be extended to the relationship between an illegitimate child and its natural father, then the result reached in *King* would have been decidedly different. The court in its decision in *King* stated that:

> ". . . Whether the substitute father is actually the father of the child is irrelevant. It is also irrelevant whether he is legally obligated to support the child, and whether he does in fact contribute to their support . . .
>
> ". . .
>
> ". . . In other words, the state argues that since in Alabama the needy children of married couples are not eligible for AFDC aid so long as their father in in the home, *it is only fair that children of a mother who cohabits with a man not her husband and not their father be treated similarly.* The difficulty with this argument is that it fails to take account of the circumstances that children of fathers living in the home are in a very different position from children of mothers who cohabit with men not their father; *the child's father has a legal duty to support him, while the unrelated substitute father, at least in Alabama, does not. We believe Congress intended the term 'parent' in §§406a of the Act, 42 U.S.C. §§606(a), to include only those persons with a legal duty of support.*
>
> ". . .

"The question for decision here is whether Congress could have intended that a man was to be regarded as a child's parent so as to deprive the child of AFDC eligibility despite the circumstances: (1) that the man did not in fact support the child; and (2) that he was not legally obligated to support the child.

". . .

". . . On the question of whether the man must be legally obligated to provide support before he can be regarded as a child's parent, the State has no such cogent answer. We think the answer is quite clear: Congress must have meant by the term 'parent' an individual who owed to the child a State-imposed legal duty of support.

". . .

". . . We think it apparent that neither Congress nor any reasonable person would believe that providing employment for some man who is under no legal duty to support a child would in any way provide meaningful economic security for that child." (Emphasis added.)

Had this Court, in its decision in *King,* felt that the decision in *Levy* gave the right to an illegitimate child to obtain support from his natural father, it would have been necessary for the court to reach a different decision as to a certain class of AFDC recipients. If the illegitimate child's father is alive and is under an obligation to support such child, by an extension of the decision in *Levy,* then this might well result in the child and the mother being ineligible for AFDC benefits regardless of whether the illegitimate child's father is actually supporting the child. Undoubtedly this Court did not wish to reach this result and consequently must have rejected the view of extending the doctrine of *Levy* suggested by the concurring opinion. Unless such

interpretation is given to the later decision in *King*, then the interpretation sought by Petitioners for the extension of *Levy* would require the reversal of *King*, or in the alternative would result in many present AFDC recipients being declared ineligible for such benefits.

In *Labine* this Court had before it an attack against certain statutes governing intestate succession that barred an illegitimate child from inheriting or sharing in its father's estate. This Court in upholding the validity of such statutory enactments specifically declined to extend the *Levy* and *Glona* rationale into an area to which it felt it did not apply. As amicus curiae is of the opinion that *Labine* is controlling in the instant case, notice should be taken of the statements found in this Court's opinion which limited further expansion of *Levy* and *Glona:*

> ". . . . The cause of action alleged in Levy was in tort. It was undisputed that Louisiana had created a statutory tort . . . so that a large class of persons injured by the tort could recover damages . . . . Under those circumstances the Court held that the State could not totally exclude from the class of potential plaintiffs illegitimate children who were unquestionably injured by the tort . . . . Levy did not say and cannot be fairly read to say that a State can never treat an illegitimate child differently from legitimate offspring . . .
>
> ". . .
>
> ". . . Absent a specific constitutional guarantee, it is for that legislature, not the life-tenured judges of this Court, to select from among possible laws. We cannot say that Louisiana's policy provides a perfect or even a desirable solution or the one we would have provided for the problem of the property rights of illegitimate children. Neither can we say that Louisiana does not have the power

to make laws for distribution of property left within the State.

We emphasize that this is not a case, like Levy, where the State has created an insurmountable barrier to this illegitimate child. There is not the slightest suggestion in this case that Louisiana has barred this illegitimate child from inheriting from her father . . . ." (Emphasis added.)

In the present case, as in *Labine,* there is no insurmountable barrier to the illegitimate child obtaining support from its natural father. The father could, as mentioned in *Labine,* legitimate the child by marrying the mother; the father could voluntarily undertake to support the child; and the father could even legally become liable for the care of the illegitimate child if he has assumed these responsibilities. *Franks v. Franks,* 138 S.W. 1110 (Tex. Civ. App. 1911, writ ref.).

As this Court concluded in *Labine,* there is nothing in the vague generalities of the Equal Protection and Due Process Clauses which would empower this Court to nullify the deliberate choices of the elected representatives of the people of Texas or the judicial determinations of the Texas courts as to the common law rule to be followed within its boundaries.

This now brings us to the recent decision of this Court in *Weber* where certain limitations upon recovery by illegitimate children under the workmen's compensation laws of Louisiana were under attack. This Court, in holding invalid the provision challenged, felt that *Levy,* rather than *Labine,* was the applicable precedent to follow in the case before it. However, the very language of *Weber* discloses that *Labine,* rather than *Weber* or *Levy,* should be controlling and the applicable precedent in the case now under consideration. This Court stated in its opinion that:

". . . in Labine the intestate, unlike deceased in the present action, might easily have modified his daughter's disfavored position . . . The burdens of illegitimacy, already weighty, become doubly so when neither parent nor child can legally lighten them . . .

". . .

". . . the state interest in minimizing problems of proof is not significantly disturbed by our decision. . ."

The foregoing statements which weigh most heavily in this Court's decision to apply *Levy* rather than *Labine* would be hardly applicable in the present case. There does not exist the insurmountable or difficult barrier to the illegitimate child receiving support from its natural father. In turn, to follow *Levy* in this case would be to trigger a potential torrent of litigation to establish paternity where matters of proof or disproof are significantly difficult and uncertain. This becomes especially critical when there exists no common law precedent within the jurisprudence of the State of Texas to either determine paternity, or such ancillary issues as support, visitation rights, and the like, and the Legislature has chosen, to date, not to exercise its exclusive right to enact statutory provisions which would offer guidelines.

The foregoing is especially true in view of the language of this Court in *McDonald v. Board of Election Commissioners of Chicago,* 394 U.S. 802, 89 S.Ct. 1404, 22 L.Ed.2d 739 (1969), where it was stated that:

". . . A legislature traditionally has been allowed to take reform 'one step at a time, addressing itself to the phase of the problem which seems most acute to the legislative mind,' Williamson v. Lee Optical of Oklahoma, In., 348 U.S. 483, 489, 99 L.Ed. 563, 573, 75 S.Ct. 461 (1955); and a legis-

lature need not run the risk of losing an entire remedial scheme simply because it failed, through inadvertence or otherwise, to cover every evil that might conceivably have been attacked."

Such cases as *Dandridge v. Williams,* 397 U.S. 471, 90 S.Ct. 1153 (1970), set forth that the Fourteenth Amendment gives to the federal courts no power to impose upon the states their views of what constitutes wise economic or social policy. Perhaps it would be wise to view this position with the warning of the dissent in *Reynolds v. Sims,* 377 U.S. 533 (1964), that not every major social ill in this country can find its cure in some constitutional principle. To attempt to cure all real or imagined inequities by innovative judicial expansion of the Fourteenth Amendment is to deprive the legislative branch of government of its very reason for existence or to create some form of competitive arena in which the separation of power doctrine is ignored and wild races are run to see which branch of government comes up with the best political solution.

CONCLUSION

For the foregoing reasons the State of Texas, as amicus curiae, is of the opinion that the courts below were correct in their judgments, from which Petitioners seek certiorari to this Court, and consequently certiorari should be denied, or in the alternative that the judgment below be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Pat Bailey, Assistant Attorney General, and one of the attorneys for the State of Texas as amicus curiae, hereby certify that copies of the foregoing amicus curiae memorandum have been mailed to Mr. Harry B. Adams III and Mr. Melvin N. Eichelbaum, 203 West Nueva Street, San Antonio, Texas 78207, on the 30th day of May, 1972.

PAT BAILEY